Supreme Court, U.S.
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# Supreme Court of the United States

October Term, 1996

C.O.N.T.R.O.L.; City of Argyle; Town of Bartonville; Town of Copper Canyon; City of Haslet; City of Justin; Town of Northlake; City of Roanoke; Argyle Independent School District; Northwest Independent School District; Argyle Volunteer Fire Department; Justin Volunteer Fire Department; Denton County Electric Co-op; Graham-Argyle Cemetery Association; Prairie Mound Cemetery Association; Justin State Bank; Northwest Regional Airport; Lil Arnold; Rebecca R. Blair; Eric C. Carpenter; Edward H. Coe; David M. Dooley; Bert H. Gibbs; Gibbs Family: Tillie H. Gibbs, H. Jarrell Gibbs, and Diane (Gibbs) Nichols; C.J. Hardeman Family; Elizabeth C. Morris; William D. Owens, Jr.; Daniel J. Schneider Family; Roger Thompson; Kay Thompson; Lois Thompson; Robert Tracy; Donald A. Wood; G.A.S.P., and Carter-Walsh Thoroughbred Farm, *Petitioners*,

vs.

Kathy Nielsen, Sentry Environmental, L.P., and Texas Natural Resource Conservation Commission,

*Respondents.*

*Petition for a Writ of Certiorari from the Supreme Court of the State of Texas*

## PETITION FOR A WRIT OF CERTIORARI

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68 pp

## QUESTIONS PRESENTED

1. May the State of Texas, by statute, restrict the application of FAA Order 5200.5A, and its federally preemptive impact?

2. May the State of Texas, by administrative agency action, defeat the application of FAA Order 5200.5A, and its federally preemptive impact?

## CITATIONS OF THIS CASE

The opinion of the Texas Court of Appeals, Third Circuit, appears at 916 S.W.2d 677 (Tex.App. -- Austin 1996). The order of the Texas Supreme Court denying review is unreported.

## BASIS FOR JURISDICTION

The Texas Supreme Court, lower courts and the Texas Natural Resource Conservation Commission (hereafter "TNRCC") have decided an important federal preemption question in a manner which conflicts with decisions of the Courts of Appeal and United States Supreme Court, and particularly in cases such as *Hines v. Davidowitz*, 312 U.S. 52, 85 L.Ed 581 (1940). In support thereof, the text of the order of the TNRCC dated March 4, 1994, and subsequent orders from Texas courts, including a final order by the Texas Supreme Court overruling a motion for rehearing on September 12, 1996, are presented for review. The statutory provision which confers jurisdiction to review by writ of certiorari is 28 U.S.C. §1257.

## CONSTITUTIONAL AND OTHER PROVISIONS

**Texas Health and Safety Code**

> "§361.069. Determination of Land Use Compatibility
>
> The commission in its discretion may, in processing a permit application, make a separate determination on the question of land use compatibility, and, if the site location is acceptable, may at another time consider other technical matters concerning the application.

A public hearing may be held for each determination in accordance with Section 361.088. In making a determination on the question of land use compatibility, the commission shall not consider the position of a state or federal agency unless the position is fully supported by credible evidence from that agency during the public hearing."

**FAA Order 5200.5A**

"1. PURPOSE. This order provides guidance concerning the establishment, elimination or monitoring of landfills, open dumps, waste disposal sites or similarly titled facilities on or in the vicinity of airports.

. . .

4. BACKGROUND. Landfills, garbage dumps, sewer or fish waste outfalls and other similarly licensed or titled facilities used for operations to process, bury, store or otherwise dispose of waste, trash and refuse will attract rodents and birds. Where the dump is ignited and produces smoke, an additional attractant is created. All of the above are undesirable and potential hazards to aviation since they erode the safety of the airport environment. The FAA neither approves nor disapproves locations of the facilities above. Such action is the responsibility of the Environmental Protection Agency and/or the appropriate state and local agencies. The role of the FAA is to ensure that airport owners and operators meet their contractual obligations to the United States government regarding compatible land

uses in the vicinity of the airport. While the chance of an unforeseeable, random bird strike in flight will always exist, it is nevertheless possible to define conditions within fairly narrow limits where the risk is increased. Those high-risk conditions exist in the approach and departure patterns and landing areas on and in the vicinity of airports. The number of bird strikes reported on aircraft is a matter of continuing concern to the FAA and to airport management. Various observations support the conclusion that waste disposal sites are artificial attractants to birds. Accordingly, disposal sites located in the vicinity of an airport are potentially incompatible with safe flight operations. Those sites that are not compatible need to be eliminated. Airport owners need guidance in making those decisions and the FAA must be in a position to assist. Some airports are not under the jurisdiction of the community or local governing body having control of land usage in the vicinity of the airport. In these cases, the airport owner should use its resources and exert its best efforts to close or control waste disposal operations within the general vicinity of the airport.

. . .

6. ACTION.

a. Waste disposal sites located or proposed to be located within the areas established for an airport by the guidelines set forth in paragraph 7a, b, and c of this order should not be allowed to operate. If a waste

disposal site is incompatible with an airport in accordance with guidelines of paragraph 7 and cannot be closed within a reasonable time, it should be operated in accordance with the criteria and instructions issued by Federal agencies such as the Environmental Protection Agency and the Department of Health and Human Services, and other such regulatory bodies that may have applicable requirements. The appropriate FAA airports office should advise airport owners, operators and waste disposal proponents against locating, permitting or concurring in the location of a landfill or similar facility on or in the vicinity of airports.

. . .

7. CRITERIA. Disposal sites will be considered as incompatible if located within areas established for the airport through the application of the following criteria:

...

c. Any waste disposal site located within a 5 mile radius of a runway end that attracts or sustains hazardous bird movements from feeding, water or roosting areas into, or across the runways and/or approach and departure patterns of aircraft."

**49 U.S.C. §40103.**

"Sovereignty and use of airspace

(a) Sovereignty and public right of transit. (1) The United States Government has exclusive sovereignty of airspace of the United States.

(2) A citizen of the United States has a public right of transit through the navigable airspace.

. . .

(b) Use of airspace. (1) The Administrator of the Federal Aviation Administration shall develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. The administrator may modify or revoke an assignment when required in the public interest.

(2) The Administrator shall prescribe air traffic regulations on the flight of aircraft (including regulations on safe altitudes) for--

(A) navigating, protecting, and identifying aircraft;

(B) protecting individuals and property on the ground;

(C) using the navigable airspace efficiently; and

(D) preventing collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects."

**United States Constitution, Article I, Section 1**

"All legislative Powers herein granted shall be vested in a congress of the United States, which shall consist of a Senate and House of Representatives."

**United States Constitution, Article I, Section 8**

"The Congress shall have power ...:

To make all laws which shall be necessary and proper

for carrying into execution the foregoing powers, and all other powers vested by this Constitution and the Government of the United States, or in any department or officer thereof."

**United States Constitution, Article VI, Paragraph 2**

"This Constitution, and the laws of the United States, which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding."

## STATEMENT OF THE CASE

This case involves Texas' refusal to defer to the FAA during the course of a state landfill permit hearing. Texas, by Texas Health and Safety Code §361.069, restricted consideration of (and by implication, deferral to) the FAA's position (and therefore its underlying orders). Further, Texas, through the TNRCC, ruled that the conditions of the restricting statute were not met. Thus, Texas effectively refused to recognize the preemptive nature of FAA Order 5200.5A(7)(c).

The TNRCC, by its orally pronounced order on March 4, 1994, and its later written order of March 31, 1994, set forth its refusal properly to defer to the FAA orders in question. Petitioners preserved their position in their Motion to Reopen the TNRCC hearing on April 19, 1994, and later in their Original Petition in the Travis County District Court

(June 9, 1994), Motion for New Trial (February 2, 1995), Brief in the Texas Court of Appeals (June 29, 1995), Motion for Rehearing (March 1, 1996), Application for Writ of Error to Texas Supreme Court (April 19, 1996), and Motion for Rehearing (August 16, 1996). At each stage, Petitioners' raising of the federal preemption issue was dismissed or overruled. Review by Texas administrative agencies and courts ceased when the Texas Supreme Court finally overruled Petitioners' Motion for Rehearing on these matters on September 12, 1996.

## ARGUMENT

The undisputed evidence established that one Petitioner -- a public use airport, Northwest Regional Airport in Denton County, Texas -- was located between a substantial bird roosting area, Lake Grapevine, and the proposed landfill site. That landfill site was located within a five-mile radius of a runway end of Northwest Regional Airport. The evidence established some birds would be drawn across the airport's runways and/or approach and departure patterns of aircraft. Thus, FAA Order 5200.5A(7)(c) became pertinent and federal jurisdiction was invoked.

Texas Health and Safety Code §361.069 restricts, directly or indirectly, the federal preemptive impact of such FAA order. That restriction is not permissible under numerous Supreme Court and Court of Appeals authorities, but at least *Hines vs. Davidowitz*, 312 U.S. 52, 85 L.Ed. 581 (1940), *International Paper Company v. Harmel Ouellette*, 479 U.S. 481, 93 L.Ed.2d 83, 107 S.Ct. 805 (1987); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 10 L.Ed.2d 248, 83 S.Ct. 1210 (1963); *Atorie Air, Inc. v. FAA*, 942 F.2d 954, 960 (5th Circuit 1991); *San Diego Air Support*

*Center, Inc. v. FAA*, 887 F.2d 966, 968 (9th Circuit 1989). Texas has previously recognized that its Constitution must yield to contrary FAA regulations. *Continental Radio Company v. Continental Bank & Trust Company*, 369 S.W.2d 359, 362 (Tex.Civ.App.--Houston 963, writ ref'd n.r.e.). See also *Eli Lilly & Co. v. Marshall*, 850 S.W. 2d 155, 160 (Tex. 1993). However, in this instance Texas, through its courts, has refused to rule contrary to its administrative agency, TNRCC.

On March 4, 1994, the TNRCC Chairman made a motion, later adopted by the whole commission, that:

> "... as a matter of policy, we find that credible evidence has not been offered into the record by the Federal Aviation Administration pursuant to state legislation passed in 1993 that the construction and operation of this facility would pose a threat to aircraft because of birds."

This clarion statement defines the problem. The FAA order was not obviated because an ambiguous Texas statute forced a Texas administrative agency to ignore the FAA order based upon a Texas obstacle to Congressional purposes being "fully supported by credible evidence from that agency during the public hearing." The FAA chief expert in the field of bird/aircraft collision testified by deposition and his testimony was introduced into evidence during the hearing. Despite that, his testimony -- which contradicted salient portions of Respondent Sentry Environmental's experts -- was not deemed credible enough. The FAA's objections and/or concerns were disregarded by mandate of the Texas statute.

That TNRCC position was effectively ratified in later orders of the TNRCC and the courts of Texas. In the process, the FAA order was not given precedence. Federal preemption was not effected. Congress has the power to control air space, 49 U.S.C. §40103(a)(1), and particularly the possibility of collision between aircraft and other airborne objects, 49 U.S.C. §40103(b)(2)(D). Thus, the Texas law pursuant to which the TNRCC acted on March 4, 1994, stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Hines v. Davidowitz, supra.* It should be stricken.

Although Petitioners were successful in defeating the landfill permit on technical grounds, they still face the renewed landfill application by Sentry Environmental, L.P., or others who wish to reapply for a landfill permit at the exact same spot. Undisputed evidence showed that there is the potential for birds to be drawn across the public-use airfield as birds travel from the landfill site to breeding grounds in a nearby public lake. Those patterns being unchangeable, the matter of the application of FAA Order 5200.5A(7)(c) remains unresolved. Texas Health and Safety Code §361.069 remains. It is still an obstacle in Texas to the accomplishment and execution of the full purposes and objectives of Congress in 49 U.S.C. §40103. See *Hines v. Davidowitz, supra.*

The alternative to reasonable and prompt judicial resolution now is another several weeks of unnecessary litigation and many hundreds of thousands of dollars in wasted litigation expense. Upon the developed record, the decision should be made now. Texas Health & Safety Code §361.069 should be stricken, and appropriate relief granted.

Respectfully submitted,

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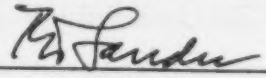
By: 

Roger D. Sanders

# APPENDIX

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1. **Oral Finding and Order of TNRCC: March 4, 1994** (stating FAA has not proven landfill threatens aircraft.)

"Further moved that we, as a matter of policy, we find that credible evidence has not been offered into the record by the Federal Aviation Administration pursuant to state legislation passed in 1993 that the construction and operation of this facility would pose a threat to aircraft because of birds. ..."

2. **TNRCC Order Denying Application: March 31, 1994** (holding as a matter of law that FAA does not preempt Commission's authority.)

TEXAS NATURAL RESOURCE
CONSERVATION COMMISSION

AN ORDER Denying the Application of Sentry Environmental, L.P. to Operate a Municipal Solid Waste Landfill in Denton County. (Proposed MSW Permit No. 2171)

On November 17, 1993, March 4, 1994, March 23, 1994, and March 30, 1994, the Texas Natural Resource Conservation Commission ("Commission") considered the application of Sentry Environmental, L.P. for a permit authorizing the operation of a Type I Municipal Solid Waste facility in Denton County, Texas.

The application was considered pursuant to the Texas Solid Waste Disposal Act, Health and Safety Code Chapter 361, as amended, applicable provisions of the Texas

Department of Health Municipal Solid Waste Management Regulations and applicable provisions of the Texas Natural Resource Conservation Commission Permanent Rules. Mr. Bill Zukauckas, Attorney, a Commission Hearings Examiner, conducted the public hearing and the evidentiary hearing.

The Commission rejects the basis upon which the Examiner recommended denial of the permit application. The Commission herein denies the permit application, but does so on a basis which the Examiner's discussion in his proposal for decision ("PFD") and supplemental proposal for decision ("SPFD") shows he found the applicant had met its burden of proof. The Commission rejects the Examiner's recommendation in his PFD and SPFD because they are against the preponderance of the evidence. "Against the preponderance of the evidence" is the standard by which the Commission may reverse an Examiner's recommendation concerning an application for a permit to operate a municipal solid waste facility.

The Examiner's recommendation is also against Commission policy; and it is not supported by the great weight of the evidence. His proposed conclusions of law concerning the landfill's effects on the market value of nearby real property are clearly erroneous in light of applicable rules. Further, the findings and conclusions below fully explain the reasoning and grounds for overturning each of the Examiner's findings of fact and conclusions of law, and for rejecting his proposal for decision on ultimate findings. The applicant argued that the reversal standards found in Section 361.0832 of the Texas Health and Safety Code apply to this proceeding. The Commission disagrees, but concludes that the record of this proceeding supports a reversal under Section 361.0832.

The Legislature created the reversal standards found in the Texas Solid Waste Disposal Act (Texas Health & Safety Code §361.0832) as part of its passage of the Waste Reduction Policy Act of 1991. Acts of 1991, 72nd Leg., ch. 296, §1.08, eff. June 7, 1991. The reversal standards specify that the "Commission" may overturn or reject an Examiner's recommendations only under certain limited circumstances. At the time of passage of the Waste Reduction Policy Act, the Texas Solid Waste Disposal Act defined "Commission" as the Texas Water Commission, which had jurisdiction over industrial and hazardous waste. This definition was to the exclusion of the Texas Department of Health, which had jurisdiction over municipal solid waste. See, Acts of 1991, 71st Leg., Sixth Called Session, ch. 10, §2, eff. September 6, 1990. Therefore, the Legislature's directive on reversal standards set out in §361.0832 concerned industrial and hazardous waste, not municipal solid waste. Those standards do not apply to this proceeding. The Commission concludes, however, that it has met the reversal standards in Health & Safety Code §361.0832 in this case.

After considering the Hearings Examiner's proposal for Decision and Order, the Hearings Examiner's Supplemental Proposal for Decision and Order, and the evidence and arguments presented, the Commission voted unanimously to deny the application. The [*sic*] makes the following Findings of Fact and Conclusions of Law:

## FINDINGS OF FACT

1. Sentry Environmental, L.P., ("Sentry" or "Applicant"), is a Texas limited partnership, with its business address at 5949 Sherry Lane, Suite 1575, Dallas, Texas 75225 (Exs. AP-22, 50, 51; v. 9: p.

2546-47).

2. Sentry seeks a permit for construction and operation of a proposed Type I municipal solid waste landfill in Denton County, Texas. The Applicant proposed to receive municipal solid waste as defined by 25 TAC 325.5 (now codified in 30 TAC 330.5). The proposed 352.68-acre site is located approximately 1.9 miles west of the intersection of Farm-to-Market Road 407 and Interstate Highway 35 West.

3. On August 17, 1990, Sentry filed with the Texas Department of Health ("TDH") Part A of an application related to property which included all the property encompassing the landfill (the "1990 Application") (Ex. 1163).

4. Sentry caused the Notice of Filing of Application to be published with respect to the 1990 Application on December 2, 1990, in the Denton Record-Chronicle, a newspaper regularly published and of general circulation in Denton County, Texas (Ex. 1170). Sentry obtained and forwarded to the TDH a publisher's affidavit relative to the publication of the Notice of Filing of Application, along with a copy of the published Notice (Ex. 1170).

5. By letter to TDH dated July 29, 1991, Sentry requested that, due to extenuating circumstances, TDH extend any date for administrative withdrawal (Ex. 1155).

6. Sentry received a letter from TDH dated August 15, 1991, advising that the 1990 Application would be

considered administratively withdrawn by TDH as of August 8, 1991, if Sentry had not submitted information necessary to make the Application administratively complete by that date (Ex. 1156).

7. By letter dated October 21, 1991, Sentry submitted project revisions to TDH (Ex. 1158).

8. By internal memorandum dated October 22, 1991, TDH staff indicated that it deemed Sentry's landfill project "reactivated" and "reinstated" and that the review process would continue (Ex. 1154).

9. Notice of Filing of Application was published on January 10, 1992, in the Texas Register, 17 Tex. Reg. 278 (Ex. AP-7).

10. Pursuant to a TDH letter dated December 30, 1991, Sentry caused the Notice of Filing of Application to be published on January 15, 1992, in the Denton Record-Chronicle, a newspaper regularly published and of general circulation in Denton County, Texas (Exs. AP-8, 1179).

11. On March 1, 1992, during the Application review process, jurisdiction and authority to issue municipal solid waste permits was transferred from the Texas Department of Health to the Texas Water Commission ("TWC"), and subsequently to the Texas Natural Resource Conservation Commission on September 1, 1993.

12. The TWC declared the Application administratively complete as of March 26, 1992 (Ex. 1165).

13. On August 11, 1992, the Examiner scheduled a prehearing conference for August 20, 1992 (8/11/92 PHC: p. 366); ruled that a public meeting was not jurisdictional (8/11/92 PHC: p. 50); and, without ruling that a public meeting was required, directed that new notice be issued setting a public meeting date and including the proposed height of the Landfill (8/11/92 PHC: pp. 297-301).

14. The TWC certified that the Notice of Application, Public Meeting and Public Hearing on Application was mailed to its standard mailing list and to property owners and interested persons on August 18, 1992 (Ex. AP-13).

15. On August 20, 1992, a prehearing conference to align parties, set a discovery schedule and set the date for the hearing on the merits convened at the Vista Ridge Inn, 2397 South Stemmons Freeway, Lewisville, Texas 75067 (8/13/92 HE ltr.; 8/20/92 PHC: p. 2). At that prehearing conference, the Examiner scheduled a prehearing conference for September 23, 1992 (8/20/92 PHC: pp. 190-192), and scheduled the hearing on the merits for January 11, 1993 (8/20/92 PHC: p. 92).

16. The Hearings Examiner designated the following as parties to the proceeding: the Applicant, Sentry Environmental, L.P.; the Executive Director of the Commission; the Public Interest Counsel of the Commission; Upper Trinity Regional Water District; the Town of Flower Mound; Ken Hulstein; and the Protestants, C.O.N.T.R.O.L.; Carter-Walsh Thoroughbred Farm; Mike Dooley; Bert Gibbs; Eric

Carpenter; Elizabeth Morris; Henry Withee; Edward Coe; the C.J. Hardeman Family; Lil Arnold; Daniel Schneider; Donald Wood; June Roberts; Catherine Hipple; the Frank A. Schultz Trust; Tillie Hall Gibbs; Roger, Kay and Lois Thompson; Justin State Bank; Northwest Independent School District; Denton County Electric Coop; Argyle Independent School District; Prairie Mound Cemetery Association; Graham-Argyle Cemetery Association; William D. Owen, Jr.; Argyle Volunteer Fire Department; Rebecca Blair; Trophy Club Municipal Utility District No. 2; Trophy Club Municipal Utility District No. 1; Justin Volunteer Fire Department; Northwest Regional Airport; Groups Allied to Stop Pollution (G.A.S.P.); Cross Timbers Sierra Club; Denton Creek Estates; the City of Argyle; the City of Northlake; the Town of Bartonville; the City of Copper Canyon; the Town of Double Oak; the City of Roanoke; the City of Haslet; the Town of Trophy Club; and the Cities of Justin and Ponder.

17. The Hearings Examiner aligned a number of the Protestants into four groups to simplify discovery and the public hearing process:

a. Group A: Mayor Mike Dooley, Bert Gibbs, Eric Carpenter, Elizabeth Morris, Henry Withee, Edward Coe, the C.J. Hardeman Family, Lil Arnold, Daniel Schneider, Donald Wood, June Roberts and Catherine Hipple, Frank Schultz, the Tillie Gibbs Family, and Lois, Kay and Roger Thompson (8/20/92 PHC: pp. 177-181; 9/23/92 PHC: pp. 9, 28, 51; 10/06/92 PHC; 10/08/92 HE ltr.). The

Hearings Examiner aligned Carter-Walsh with Group A on March 3, 1993 (3/03/93 HE ltr.).

b. Group B: Justin State Bank, Northwest I.S.D., Denton County Electric Coop, Argyle I.S.D., Prairie Mound Cemetery Association, Graham-Argyle Cemetery Association, William Owens, Jr. and the Justin Volunteer Fire Department, Robert Tracy and the Argyle Volunteer Fire Department, Rebecca Blair, Northwest Regional Airport, Trophy Club MUD #2, and Trophy Club MUD #1 (8/20/92 PHC: pp. 176-179, 181; 9/23/92 PHC: pp. 25, 66, 91-92, 96, 126).

c. Group C: G.A.S.P., Kathy Nielsen and a group of Denton Creek Estate Owners, and Cross Timbers Sierra Club (8/20/92 PHC: pp. 175, 181; 9/23/92 PHC: p. 17; 9/29/92 HE ltr.).

d. Group D: City of Argyle, City of Northlake, Town of Bartonville, City of Copper Canyon, Town of Double Oak, City of Roanoke, City of Haslet, Town of Trophy Club, City of Justin and City of Ponder, and Denton County (8/20/92 PHC: pp. 173-175, 181-182; 9/23/92 PHC: p. 122).

18. In a letter dated August 24, 1992, the Examiner bifurcated the hearing on the merits into a land use component and a technical component (8/24/92 HE ltr.).

19. The Notice of Application, Public Meeting and Public Hearing on Application was published on August 21, 1992, in the Dallas Morning News, a newspaper regularly published in Dallas County, Texas, and generally circulated in the Texas counties of Dallas, Tarrant, Grayson, Cooke, Collin, Wise, and Denton (Ex. AP-12).

20. The Notice of Application, Public Meeting and Public Hearing on Application was published on August 21, 1992, and on September 4th, 11th, and 18th of 1992 in the Denton Record-Chronicle, a newspaper regularly published in Denton County, Texas and generally circulated in Denton County (Exs. AP-11, AP-10).

21. On September 1, 1992, Sentry certified that it had mailed the Notice of Application, Public Meeting and Public Hearing on Application by first class mail on August 22, 1992, to each residential or business address located within one-half (and even three-quarters) of a mile of the site and to each owner of real property located within one-half (and even three-quarters) of a mile of the site listed in the real property appraisal records of the Denton County Appraisal District in compliance with Section 361.081 of the Texas Health and Safety Code (Ex. AP-14).

22. Notice of the Public Meeting and Public Hearing on the Application was published September 11, 1992, in the Texas Register, 17 Tex. Reg. 6328 (Ex. AP-9).

23. The public meeting was held at 7:00 p.m. on September 22, 1992, at the Sheraton Denton Hotel and Conference Center, 2211 IH-35 E. North, Denton, Texas.

24. On October 6, 1992, a prehearing conference to hear argument on the scope of the land use compatibility issue convened at 11:30 a.m. at the Vista Ridge Inn, 2397 South Stemmons Freeway, Lewisville, Texas (9/24/92 HE ltr.; 10/06/92 PHC).

25. The Frank A. Schultz Trust, holding property over three and one-half miles from the site, through its representative Charles H. Schultz, appeared at the October 6, 1992, hearing and was admitted as a party Protestant to the proceeding (PHO: 3; 10/06/92 PHC; 10/08/92 HE ltr.).

26. Sentry submitted changes to the Application on November 23, 1992, by letter from Ellis Herrington hand-delivered to the Executive Director to the attention of Seyed Miri and also delivered to the Examiner (Ex. AP-22).

27. By letter dated November 20, 1992, the Examiner scheduled a prehearing conference for December 4, 1992, and continued the hearing on the merits from January 11, 1993, to a date to be set at the December 4, 1992, prehearing conference (11/20/92 HE ltr.).

28. On December 4, 1992, a prehearing conference set by the Examiner for the stated purpose of considering whether or not Sentry would be allowed to make any changes to the Application, setting a new discovery

schedule and hearing date, projecting dates for the entire hearing process, addressing discovery concerns and status, considering motions for issuance of subpoena for depositions and orders for entry onto parties' properties and setting up a pretrial order convened at 9:00 a.m. at the Radisson Hotel, 2211 I-35E North, Denton, Texas (12/04/92 PHC: p. 3). The Examiner scheduled the next prehearing conference for January 11, 1993 (12/04/92 PHC: p. 204). The Examiner also requested that briefs be submitted to address whether Section 12.016 of the Texas Health and Safety Code applies via Senate Bill 2 and Senate Bill 1099, and whether the Application changes were "major" or "minor" amendments (12/04/92 PHC: pp. 167-170, 187-188, 195).

29. On January 11, 1993, a prehearing conference convened at 10:00 a.m. at the Radisson Hotel, 2211 I-35E North, Denton, Texas (12/28/92 HE ltr.; 1/11/93 PHC: p.3).

30. On January 11, 1993, the Examiner stated that he deemed Sentry's Application changes to be major amendments to the Application requiring new notice to be issued, pursuant to 30 T.A.C. §281.23 and §305.62 (12/28/92 HE ltr.; PHO: 6; 1/11/93 PHC: pp. 177-179), and stated he formally received Sentry's changes to the Application (Ex. AP-22).

31. In a letter ruling dated January 15, 1993, the Examiner determined that the hearing on the merits of the land use compatibility issue would commence on March 22, 1993 (1/15/93 HE ltr.; 1/10/93 PHC).

32. In a letter dated February 12, 1993, the Examiner scheduled a prehearing conference for February 22, 1993, to consider all pending motions and any other unresolved issues and production problems, and to reduce the total number of witnesses (2/12/93 HE ltr.).

33. On February 22, 1993, a prehearing conference convened at 10:00 a.m. at the Radisson Hotel, 2211 I-35E North, Denton, Texas (2/12/93 HE ltr; 2/22/93 PHC: p.3). The Examiner scheduled a prehearing conference for March 15, 1993 (2/22/93 PHC: p. 419).

34. The Notice of Amended Application, Revised Draft Permit, and Public Hearing on Application was published February 19, 1993, in the Denton Record-Chronicle, a newspaper regularly published in Denton County, Texas, and generally circulated in Denton County (Ex. AP-26).

35. The Notice of Amended Application, Revised Draft Permit, and Public Hearing on Application was published February 19, 1993, in the Dallas Morning News, a newspaper regularly published in Dallas County, Texas, and generally circulated in the Texas counties of Dallas, Tarrant, Grayson, Cooke, Collin, Wise, and Denton (Ex. AP-27).

36. The TWC certified that the Notice of Amended Application, Revised Draft Permit, and Public Hearing on Application was mailed by first class mail on February 19,1993, to its standard mailing list and to property owners and interested persons (Ex. AP-

30).

37. On March 17, 1993, Sentry certified that it had mailed Notice of Amended Application, Revised Draft Permit, and Public Hearing on Application by first class mail on February 19, 1993, to each residential or business address located within one-half (and even three-quarters) of a mile of the site and to each owner of real property located within one-half (and even three-quarters) of a mile of the site listed in the real property appraisal records of the Denton County Appraisal District as of February 19, 1993, in compliance with Section 361.081 of the Texas Health and Safety Code and in compliance with Section 305.103 of the Commission's rules (Ex. AP-29).

38. The TWC certified that it had mailed the Notice of Public Meeting on Application Amendments concerning a Municipal Solid Waste Management Facility Permit on February 25, 1993, to its standard mailing list and to property owners and interested persons (Ex. AP-25).

39. The Notice of Public Meeting on Application Amendments Concerning a Municipal Solid Waste Management Facility Permit was published on March 1, 8, and 15, 1993, in the Denton Record-Chronicle, a newspaper regularly published and generally circulated in Denton County, Texas (Ex. AP-24).

40. Notice of the Public Hearing on the Application was published March 5, 1993, in the Texas Register, 18 Tex. Reg. 1442 (Ex. AP-31).

41. On March 15, 1993, a prehearing conference to finalize hearing plans, to exchange exhibits and prefiled testimony, to present proposed sections of the pretrial order, to consider any pending motions, and to submit witness lists in connection with the land use hearing convened at 10:00 a.m. at the Radisson Hotel, 2211 I-35E North, Denton, Texas (2/25/93 HE ltr.; 3/03/93 HE ltr.; 3/12/93 HE ltr.; 3/15/93 PHC: p. 3).

42. The public meeting on the Application amendments was held at 8:30 a.m. on March 22, 1993, at the Holiday Inn, 1500 Dallas Drive, Denton, Texas.

43. On March 22, 1993, a prehearing conference to determine whether the new notice documents would be received into evidence, to determine whether there were any new persons seeking party status, and to review the pretrial order convened at 10:00 a.m. at the Holiday Inn, 1500 Dallas Drive, Denton, Texas (3/22/93 PHC: pp. 2, 4).

44. The hearing on the merits of land use compatibility commenced on March 29, 1993, at 1:00 a.m. [*sic*] at the Holiday Inn, 1500 Dallas Drive, Denton, Texas 76205, and it continued intermittently until April 16, 1993, when it concluded (v.1: p. 2; v. 14-B: p. 4712).

45. On May 28, 1993, the Examiner determined it would be inefficient, impractical and legally confusing not to finish the public hearing and, thus, he ordered the hearing on the merits of the remaining technical issues to begin June 28, 1993, and scheduled a prehearing conference for June 21, 1993 (5/28/93 HE ltr.), which subsequently was changed to June 22,

1993 (6/11/93 HE ltr.).

46. On June 22, 1993, a prehearing conference to exchange exhibits and to discuss preliminary hearing concerns convened at 11:30 a.m. at the Radisson Hotel, 2211 I-35E North, Denton, Texas (6/11/93 HE ltr.; 6/22/93 PHC: pp. 2-3).

47. On June 28, 1993, the hearing on the merits of technical issues commenced at 11:00 a.m. at the Holiday Inn, 1500 Dallas Drive, Denton, Texas 76205, and it continued intermittently until July 13, 1993, when it concluded (v. 15: p. 4714; v. 24: pp. 7405, 7702).

48. On November 17, 1993, the Commission convened a public meeting where the Commission considered the Examiner's proposal for decision and proposed order. After hearing argument, the Commission remanded the proceeding to the Office of Hearings Examiners, and directed the Examiner to evaluate, and to take additional evidence, on three issues: (1) whether Sentry had properly characterized deep underground water, (2) whether the proposed landfill would unreasonably affect the use of adjacent property, and (3) whether there was credible evidence the proposed landfill posed an unreasonable risk of bird strikes at a nearby airport.

49. On January 24 - 26, 1994, and on February 4, 1994, the Hearings Examiner reconvened the evidentiary hearing in accordance with the Commission's remand instructions.

50. On March 4, 1994, the Commission convened a public meeting in Denton, Texas, to consider (1) the Examiner's supplemental proposal for decision and proposed order, (2) Sentry's motion to reopen the evidentiary record, and (3) whether the proposed facility would be in compliance with RCRA Subtitle D requirements. Concerning Sentry's motion to reopen, no party raised this issue during oral argument. Concerning compliance with RCRA Subtitle D, the Commission did not reach the issue because the Commission voted to deny the permit.

51. On March 23, 1994, the Commission convened a public meeting to consider (1) a proposed order prepared by the General Counsel and (2) Sentry's motion reurging its motion to reopen the evidentiary record. The Commission postponed consideration for one week.

52. On March 30, 1994, the Commission convened a public meeting where the Commission considered (1) a proposed order prepared by the General Counsel and (2) Sentry's motion reurging its motion to reopen the evidentiary record. The proposed order contained specific findings of fact and conclusions of law that the General Counsel suggested the Commission adopt as a written order in support of its March 4, 1994 motion to deny the application.

53. The Examiner's Supplemental Proposal for Decision recommends denial of Sentry's application for a permit based upon the Examiner's conclusion that Sentry had not shown the landfill would not cause a significant negative impact in the market value of real

property surrounding the site. The Examiner concluded declining real property market values alone establish that the operation of the landfill is incompatible with surrounding land use.

54. Neither the Texas Solid Waste Disposal Act nor the Commission rules which apply to this application state the Commission may deny a permit application for a municipal solid waste facility because the facility would adversely affect the market value of real property surrounding the site of the facility.

55. Section 361.069 of the Texas Health & Safety Code provides that the Commission may make a determination of land use compatibility. The Commission's rule promulgated under this statute, 30 Tex. Admin. Code §330.65(b)(5)(A) identifies various factors to be considered in a determination of land use compatibility. However, neither the statute nor the rules provide that declining real property market values are even a factor in determining whether the operations of the proposed landfill are compatible with surrounding uses. The Examiner recommends that the Commission establish declining real property market values as the sole factor in making this determination.

56. As a matter of policy, the Commission rejects the Examiner's recommendation to establish declining real property market values as the sole factor in determining compatibility of the proposed site with adjacent land use. Therefore, the Commission rejects the Examiner's proposed findings of fact and conclusions of law as they contradict Commission

policy, Commission rules, and statute.

57. There is a second basis to reject the Examiner's proposed findings of fact number 47 through 52 concerning market value. The preponderance of the evidence and the great weight of the evidence shows that the operation of the landfill would not unreasonably affect market value of nearby property. The testimony and exhibits prepared by Sentry witness Mr. Shuler showed a credible analysis of the actual effect of a landfill on market values of nearby property. Further, his analysis focused upon existing landfills in the surrounding region.

58. The Examiner determined the operation of the landfill could have a significant adverse impact on nearby landowners because the market value of their land could be adversely affected. This determination was based upon the testimony of Protestant (C.O.N.T.R.O.L.) witness Mr. Vanderlaan, and the sale of the Bingham 47 acre tract at $1,000 per acre.

59. The testimony of Mr. Vanderlaan was not credible. His testimony concerning the impact of the proposed landfill on adjacent property values was unreasonably affected by his direct participation in the February 1993 sale of the Bingham tract. As agent for the seller he set the price, and if the sale price was too low then it was his responsibility. His testimony that the low sale price was attributable to the proximity of the proposed landfill, rather than the seller was forced to sell the property for personal financial reasons, was not credible. The credibility of Mr. Vanderlaan's testimony was further reduced by the fact he left

unsaid during his April 1993 testimony the effect the Binghams' personal finances could have had on the sale price of the Bingham tract.

60. The preponderance of the evidence and the great weight of evidence in the record also shows that the sale of the Bingham tract was not an arm's-length transaction, and should not be used to determine the market value of real property. Exhibit Nos. 1281, 1287, 1289, and 1290.

61. The Examiner in his PFD and SPFD concluded that Sentry showed the operation of the landfill would adequately protect groundwater beyond the boundaries of the landfill site. The conclusion arose from his determination that there was no deep groundwater in the unweathered Denton Clay which could form a pressure head against, and breach, the bottom of the landfill's liner.

62. The Commission is responsible for regulating the operation of municipal solid waste facilities in Texas, including safeguarding the health, welfare, and physical property of the people. In accordance with this mandate, the Commission requires applicants to prove a landfill is designed "so as not to contaminate the groundwater beyond the boundaries of the site." 30 T.A.C. §330.65(b)(5)(D)(ii). Proper characterization of groundwater is a critical fact upon which the design and effectiveness of the landfill liner, the groundwater monitoring plan, and the leachate collection and methane collection systems is based.

63. As a matter of Commission policy, the Commission finds that the record evidence shows Sentry has not met its burden to show the landfill will not contaminate groundwater beyond the boundaries of the site.

64. The Examiner's conclusion that Sentry met its burden to show the landfill would not contaminate groundwater beyond the boundaries of the site was against the preponderance of the evidence and was not supported by the great weight of the evidence.

65. Staff witness Mr. Adidas' testimony shows that Sentry's design does not contemplate a hydrostatic head of above ten feet above the bottom of the liner. It does not do so because Sentry's position is that there is no deep groundwater system and there is no means by which shallow groundwater may infiltrate down to the deep groundwater system. Nor does Sentry contemplate that seasonal high water may affect the level of groundwater in the unweathered Denton Clay. The Commission cannot make these fact determinations based on the evidentiary record, yet Sentry's landfill is designed assuming these are the correct facts. Consequently, the proposed design of the landfill could result in groundwater contamination.

66. Mr. Adidas testified that Sentry had met the requirements of Commission rule 330.65(b)(5)(I)(ii) (soil data) concerning stabilization of water. Exhibit No. 1902. That there is staff testimony that Sentry met this requirement does not alone establish whether the proposed landfill would contaminate groundwater

beyond the boundaries of the site. Moreover, the Commission gives less weight to the fact Mr. Adidas so testified given Mr. Adidas prepared his prefiled testimony (Exhibit No. 1902) before Mr. Adidas saw, and Sentry showed at the hearing, the evidence in Exhibit No. 1099 concerning what Sentry describes as data from leaking piezometers.

67. The Examiner attached less weight to the data produced by piezometer readings than the other tests performed by Sentry to characterize groundwater. This great reliance on tests other than the piezometer readings was against the preponderance of the evidence and not supported by the great weight of the evidence which showed that the proper characterization of deep groundwater at the site required accurate and sufficient piezometer data, and that such data had not been supplied. Staff witnesses Adidas and Forehand both testified to this effect. The record shows Sentry installed 32 piezometers to characterize groundwater at the site. Most of these piezometers were used to characterize deep groundwater, and of these all collected water.

68. Sentry witness Mr. Reed rebutted that Sentry had accurately characterized deep groundwater, and that the piezometer readings were accurate because leaking was likely to occur under the circumstances. However, Mr. Reed's explanation why he had accurately characterized deep groundwater was not credible.

69. Mr. Reed's July 1993 rebuttal testimony showed that he was convinced in 1990 there was no deep

groundwater in the unweathered Denton Clay and the Fort Worth Limestone. He reached this conclusion even though many of the deep piezometers collected water. He concluded that the water was not deep groundwater but was shallow groundwater which leaked into the piezometers. His determination that the water collected was shallow groundwater was made on the basis of other geological tests which themselves require assumptions that the test results reflect geologic conditions throughout the entire site. Mr. Reed testified that additional piezometers installed after 1990 were not at his request, but rather to satisfy the concerns of others, because each of the piezometers were in his estimation not a "failure." Mr. Reed's position is contrary to the position of Sentry witness Mr. Herrington whose July 1993 testimony shows Mr. Herrington's evaluation that many of the piezometers were a "failure," at least as far as measuring deep groundwater.

70. The Examiner concluded that Sentry had accurately characterized groundwater. This conclusion was against the preponderance of the evidence and not supported by the great weight of evidence.

71. Sentry's Exhibit No. 1099, introduced at hearing, indicated some higher groundwater levels than Sentry reported in its application, plate 59 (Exhibit No. 1005), or the design elevations reflected in application attachments 7A - C (Exhibit Nos. 105-107).

72. Staff Witness Mr. Forehand explained that if actual groundwater levels are higher than the liner design

capability, then groundwater may push up against the bottom of the liner, thereby damaging it, or saturating the liner and causing it to fail.

73. Mr. Herrington's July 1993 direct testimony and Mr. Reed's July 1993 rebuttal testimony both show that they believed Sentry could have installed more piezometers to better characterize and identify the saturated zones. Rather than successfully carrying out the effort, they relied on other less persuasive analyses.

74. Mr. Herrington's July 1993 direct testimony shows his determination that Sentry could have continued to bail water from the deep piezometers which collected water. Sentry would have had more evidence the water was from shallow groundwater if in the re-bailed piezometers the water did not return to the same levels. Sentry did not carry out this work.

75. Sentry concluded that the data reflecting varying water levels collected from its deep piezometers supported its conclusions that there is no deep groundwater at the site. The Commission finds that Sentry failed to credibly explain why water collected in the piezometers.

76. Sentry relied on other analyses to make its determination that there is no deep groundwater at the site, including soil suction tests, pocket penetrometer tests, and inspections of core samples. Concerning soil suction tests, Sentry's witnesses in the July 1993 hearing placed great weight on tests from three boring holes. Sentry's witness relied heavily on the pocket

penetrometer tests to show the absence of groundwater, in spite of the fact that the evidence showed that these tests are designed only to measure the resistance of a material. Sentry's witnesses relied heavily on tests of core samples. Sentry argued the core samples showed the unweathered Denton Clay is dry and there are no cracks or fissures.

77. Sentry's witnesses should not have relied so heavily on the soil suction, pocket penetrometer, and core samples data in reaching a conclusion concerning the characterization of deep groundwater. This data does not outweigh and is not dispositive in the face of so much piezometer data which suggested there was deep groundwater. Staff witness Mr. Adidas' testimony showed that data which shows that some portions of the unweathered Denton Clay is impermeable does not preclude the existence of a deep groundwater system, especially where some piezometer data suggests there is a deep groundwater system. The fact Sentry's witnesses placed undue weight on the other tests lessened the witnesses' credibility.

78. The evidence shows that one threat to groundwater protection that has not been properly accounted for is the accumulation of deep groundwater by infiltration of shallow groundwater. The Examiner noted that there was general agreement among the parties that deep groundwater would threaten the bottom of the landfill liner only if groundwater rose to a level of ten feet above the bottom of the liner. However, one of the Examiner's findings was that there were no fissures and cracks in the unweathered Denton Clay

which could allow a hydrostatic head to form. He based his finding primarily upon the absence of cracks in the core samples. This finding is against the preponderance of the evidence and not supported by the great weight of the evidence.

79. Sentry's consultants prepared a geotechnical investigation of the landfill site. Applicant's Exhibit No. 931, et seq. The investigation reported the presence of secondary fissures and joints in the unweathered Denton Clay. In July 1993 Mr. Reed testified that the report meant to state there are no cracks or fissures except those created by excavation, and that he believed there were no naturally occurring fracturing, joints or fissures in the unweathered Denton Clay. Tr. 7651. But in January 1994 he testified there may be naturally occurring cracks or fissures in the unweathered Denton Clay. Tr. 7944.

80. The discussion in Sentry's hydrology and geology report (which shows Mr. Herrington's engineering seal) concerning the existence of fractures, seams, or other structures shows the determination there could be fissures and cracks in the unweathered Denton Clay even though Sentry's tests had not detected them. The report anticipates there could be naturally occurring fractures, seams, or other structures; the report does not limit the concern to secondary (due to excavation) cracks or fissures. Applicant's Exhibit No. 1014 et. seq.

81. Sentry's position that there are no cracks, fissures and joints in the unweathered Denton Clay is not credible because of the conflicts in Sentry's evidence.

82. The testimony of staff witnesses Adidas and Forehand shows that Sentry has not established whether a seasonal high water table could threaten the proposed liner design. There may be cracks and fissures in the unweathered Denton Clay that could allow infiltration of shallow groundwater into a deep groundwater system, resulting in a hydrostatic head which could exceed the design capability and thereby threaten the proposed liner.

83. The Examiner concluded that any threat of a hydrostatic head pushing against the bottom of the liner could be addressed during construction.

84. As stated in a finding of fact above, the Commission is responsible for managing the operation of municipal solid waste facilities in Texas, including safeguarding the health, welfare, and physical property of the people. In accordance with the mandate, the Commission requires applicants to prove a landfill is designed "so as not to contaminate the groundwater beyond the boundaries of the site." 30 T.A.C. §330.65(b)(5)(D)(ii).

85. As a matter of Commission policy, given the evidence in this record the Commission cannot grant Sentry a permit to construct a municipal solid waste landfill with (1) instructions to follow Commission rule 330.65(b)(5)(D)(iii)(IV) (concerning construction of the liner based on groundwater encountered during construction), or (2) a permit special condition concerning groundwater encountered during construction.

86. Given that Sentry has not to date successfully characterized the deep groundwater system, the Commission should not grant Sentry's permit application, and rely upon Sentry to successfully characterize the deep groundwater system at a later date. Sentry proposed in its briefs a special condition which in part contemplates the use of monitor wells/piezometers to monitor the unweathered Denton Clay. The Commission finds that there is no justification for it to rely on this method because to date Sentry has failed to successfully characterize deep groundwater by use of piezometers.

87. There is a second reason to reject the Examiner's conclusions on allowing Sentry to address groundwater concerns during excavation. His conclusions are against the preponderance of the evidence and not supported by the great weight of the evidence.

88. Sentry relied on a diagram (Exhibit No. 1036) to show Sentry is prepared to adjust the liner to protect against hydrostatic pressure against the bottom of the liner which is detected during construction. See, Sentry's proposed technical finding of fact no. 80(d) of September 8, 1993. However, the letter attached to the diagram shows Sentry's conclusion there would be no need for thickening the bottom of the liner, and that the diagram shows the proposed thickening of the sidewalls of the liner to address shallow groundwater detected during construction. Exhibit Nos. 1034-5.

89. Sentry witness Mr. Herrington explained that during excavation the detection of saturated strata would be

by visual inspection, and by analysis of soil saturation and soil suction tests. T. 5596. However, the tests Sentry proposes to use have to date not successfully characterized the unweathered Denton Clay.

90. The opinions of Federal Aviation Administration employee Mr. Eugene LeBoeuf, and Exhibit No. 721 (FAA letter by Mr. William E. Mitchell), should be given less weight than the opinions of Sentry witness Mr. Southern. The opinions of Mr. Mitchell and Mr. LeBoeuf were not based on a thorough review and analysis of all the pertinent facts. Testimony of FAA witness Mr. Staley; Exhibit No. 1322.

91. The FAA's position as expressed in Exhibit No. 721 was not fully supported by credible evidence from the FAA. The opinions of Mr. Mitchell and Mr. LeBoeuf were not based on a thorough review and analysis of all of the pertinent facts. Testimony of FAA witness Mr. Staley; Exhibit No. 1322. Moreover, Mr. LeBoeuf's testimony concerned his own opinions, and were not the official position of the FAA. Exhibit No. 1322 at 111, 130, 157, and 255.

92. The Examiner's proposal for decision and supplemental proposal for decision refer to his "alternative findings of fact and conclusions of law." The alternative findings and conclusions were not part of the Examiner's proposed order denying permit. They suggest the adoption of hundreds of findings and conclusions prepared by Sentry and filed on September 8, 1993. Some are contrary to the Examiner's own conclusions as shown in the discussion in his proposal for decision and

supplemental proposal for decision. Specifically, the Examiner recognized there was extensive testimony and data concerning piezometer readings which did not support his conclusion of no deep groundwater. SPFD at 5, 8. But the "alternative" findings show the testimony and data on piezometer readings support a conclusion of no deep groundwater. Alternative findings of fact nos. 407 - 410.

93. The alternative findings and conclusion are inconsistent with the Examiner's recommendations as shown in his PFD and SPFD. Moreover, they are not necessary to this order denying the application. The Commission should not adopt the alternative findings and conclusions.

94. On February 10, 1994 Sentry filed a motion to reopen the evidentiary record for purposes of taking additional evidence concerning the characterization of deep groundwater, and concerning a proposed permit special condition. Sentry later filed pleadings on three occasions which reurged this motion. Sentry's pleading of March 28, 1994 which reurged the motion to reopen the evidentiary record also requested the Commission take official notice of several matters. However, on Sentry's motion, the Commission has once already remanded the hearing to take additional evidence concerning the characterization of deep groundwater. The evidence which was the result of the remand was of limited value as far as supporting Sentry's position. The largest part of the additional evidence was data from five new piezometers screened solely in the deep formations, all of which registered water. The Commission has already given

Sentry fair opportunity to meet its burden, and should deny the most recently filed motion.

95. The Examiner proposed alternative findings of fact and conclusions of law. While the Commission does not consider these and other alternative suggestions as the Examiner's recommendation, the Commission specifically rejects the alternatives for the reasons set forth above.

## CONCLUSIONS OF LAW

1. The Commission has jurisdiction under the Texas Solid Waste Disposal Act to consider Sentry's application. Tex. Health & Safety Code Ann. §361.01 et. seq. (Vernon 1994).

2. The Application was processed and the proceedings herein were conducted in accordance with the Texas Solid Waste Disposal Act, the applicable substantive regulations and all procedural requirements relating to notice, hearing, and due process of law. The Legislature's directive on reversal standards set out in Texas Health & Safety Code §361.0832 do not apply to municipal solid waste landfill applications. While those standards do not apply to this proceeding, the reversal standards found in §361.0832 have been satisfied.

3. The Federal Aviation Administration's Executive Order No. 5200.5A provides guidance concerning the location of municipal solid waste landfills within the vicinity of airports. An FAA letter issued pursuant to this order does not preempt the Commission's

authority and duty to determine whether a proposed landfill is compatible with adjacent land uses. As the FAA order states itself, the FAA neither approves nor disapproves locations of landfill facilities.

4. The Examiner's proposed conclusions of law on the landfill's effect upon the market value of nearby real property are clearly erroneous in light of applicable rules. There is no law or rule which specifies the Commission may deny a permit application for a municipal solid waste facility on the basis of effects on market value alone.

5. Sentry has not adequately characterized deep groundwater at the site, and has not established the operation of the landfill as proposed would not contaminate groundwater beyond the boundaries of the site.

6. Based on the Commission's duty to control the management of municipal solid waste in Texas, and its duty to safeguard the health, welfare, and physical property of the people, the Commission should deny Sentry's permit application.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS NATURAL RESOURCE CONSERVATION COMMISSION THAT:

1. The application of Sentry Environmental, L.P. for a permit to authorize operation of a Type I Municipal Solid Waste Site is denied.

2. The Commission does not adopt the Examiner's

proposal for decision, supplemental proposal for decision, proposed orders, or alternative findings of fact and conclusions of law.

3. Sentry's February 10, 1994, motion to reopen the record is denied, and Sentry's March 28, 1994, motion reurging the motion to reopen the record is denied.

4. The Commission does not reach the issue concerning Sentry's compliance with RCRA Subtitle D because the Commission votes to deny the permit.

5. All other requests for relief, unless specifically granted herein, are denied.

6. The Chief Clerk of the Texas Natural Resource Conservation Commission shall forward a copy of this Order to all parties.

7. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any protion shall not affect the validity of the remaining portions of the order.

Issue Date: March 31, 1994

TEXAS NATURAL RESOURCE
CONSERVATION COMMISSION
/s/ John Hall
John Hall, Chairman

ATTEST:
/s/ Gloria A. Vasquez
Gloria A. Vasquez, Chief Clerk

3. **TNRCC Letter Notice of Denial of All Motions For Rehearing: June 17, 1994**

May 26, 1994

Roliff H. Purrington, Jr.
Mayor, Day, Caldwell & Keeton, L.L.P.
100 Congress, Suite 1500
Austin, TX 78701-9200

RE: SENTRY ENVIRONMENTAL LP;
Proposed MSW Permit No. 2171
Denial of Permit Application

This letter will serve to advise you that the Texas Natural Resource Conservation Commission considered and denied all motions for rehearing in the referenced matter on May 11, 1994. Therefore, no changes will be made to the order issued March 31, 1994.

This notification of the Commission's decision is provided in accordance with Section 16(b) of the Administrative Procedure and Texas Register Act (APTRA), TEX. REV. CIV. STAT. ANN. art. 6252-13a, which requires that the Commission notify all attorneys and parties of record by first class mail of the agency's final decision.

Should you have any questions, please contact us.

Sincerely,

/s/ Gloria A. Vasquez
Gloria A. Vasquez, Chief Clerk

(Denial was in reference, *inter alia*, to the pertinent federal preemption issue.

...

"4. Protestants assert that the FAA's orders and recommendations must be considered when determining land use compatibility, and further assert that FAA opinion in this case, alone or with other evidence, establishes a serious, life-threatening incompatibility; that it meets any Texas statutory requirement for consideration; that, therefore or because of Federal preemption, should govern in this case; and that any contrary conclusion is excepted and objected to. ...

III. More Complete Rehearing Grounds

...

C. In violation of §330.65(b)(5)(A)(ii) and federal preemption standards, the Commission failed to give proper weight to the testimony of the FAA.")

4. **Trial Court Order of Dismissal: September 12, 1994**

NO. 94-07067

| | |
|---|---|
| SENTRY ENVIRON-<br>MENTAL, L.P., Plaintiff<br>vs.<br>TEXAS NATURAL<br>RESOURCE CONSERVATION<br>COMMISSION, Defendant<br>and<br>CARTER-WALSH THOROUGH-<br>BRED FARM, Intervenor-Defendant)<br><br>and<br><br>C.O.N.T.R.O.L., et al.,<br>Plaintiff<br>and<br>CARTER-WALSH THOROUGH-<br>BRED FARM, and<br>KATHY NIELSEN,<br>Intervenor-Plaintiffs,<br>vs.<br>TEXAS NATURAL RESOURCE<br>CONSERVATION COMMISSION,<br>Defendant<br>and<br>SENTRY ENVIRONMENTAL,<br>L.P., Intervenor-Defendant. | )IN THE DISTRICT<br>)COURT OF<br><br><br><br><br><br><br><br><br><br><br>)TRAVIS COUNTY,<br>)TEXAS<br><br><br><br><br><br><br><br><br><br>)201st DISTRICT<br>)COURT |

**ORDER DISMISSING PLAINTIFF'S AND PLAINTIFF INTERVENOR'S CLAIMS FOR WANT OF JURISDICTION**

Came on to be heard this 12th day of September, 1994, the pleas to the jurisdiction of defendant Texas Natural Resources Conservation Commission and intervenor-defendant Sentry Environmental, L.P. in the above entitled matter. The Court hereby grants the pleas to the jurisdiction of the Texas Natural Resources Conservation Commission, defendant, and Sentry Environmental, L.P., intervenor-defendant, and dismisses for want of jurisdiction the claims of plaintiffs C.O.N.T.R.O.L., et al., and plaintiff-intervenors Carter-Walsh Thoroughbred Farms and Katherine Nielsen.

C.O.N.T.R.O.L. et al., Carter-Walsh Thoroughbred Farm, and Kathy Nielsen remain parties to this suit solely as intervenor-defendants in opposition to the claims of Sentry Environmental, L.P. in the above entitled matters.

ORDERED AND ENTERED this 12th day of September, 1994.

_____

F. Scott McCown
Presiding Judge,
201st Judicial District

(Dismissal was in reference to Petitioners' Original Petition in the Travis County District Court asserting federal preemption.

"...Further, Plaintiffs seek the Court's reversal of the Commission's refusal to deny the proposed

application on the basis of land use, ... FAA and bird strike incompatibility issues, ...

Furthermore, and/or specifically, Plaintiffs raise for consideration on each of the specific grounds set forth above the Commission's refusal to deny the application on the following grounds as addressed in the following identified portions of the March 31, 1994 order:

> 2. The Commission's decision to rely primarily upon the testimony of Sentry's bird expert rather than upon the credible testimony in the record from the federal government's top-ranking FAA wildlife expert, Mr. Gene LeBoeuf.
>
> ...
>
> VII. DECLARATORY JUDGMENT

To the extent a judicial review and/or appeal is appropriate pursuant to Gov. Code §2001.176 or declaratory judgment would be appropriate in order properly to have this Court resolve such issues as the FAA Order 5200.5A's application to the pertinent facts, Plaintiffs additionally and/or alternatively invoke the Court's power pursuant to the Uniform Declaratory Judgment Act. ...")

5. **Trial Court Order Denying Motion for New Trial: March 14, 1995**

NO. 94-07067

| | |
|---|---|
| SENTRY ENVIRONMENTAL, L.P., Plaintiff | )IN THE DISTRICT<br>)COURT |
| v. | )OF TRAVIS<br>)COUNTY, TEXAS |
| TEXAS NATURAL RESOURCE CONSERVATION COMMISSION, Defendant | )<br>)<br>)201st JUDICIAL<br>)DISTRICT |

ORDER

On this date came on to be considered the Motion for New Trial and the Motion for Sanctions filed by C.O.N.T.R.O.L.; City of Argyle; Town of Bartonville; Town of Copper Canyon; City of Haslet; City of Justin; Town of Northlake; City of Roanoke; Argyle Independent School District; Northwest Independent School District; Argyle Volunteer Fire Department; Justin Volunteer Fire Department; Denton County Electric Co-Op; Graham-Argyle Cemetery Association; Prairie Mound Cemetery Association; Justin State Bank; Northwest Regional Airport; Lil Arnold; Rebecca R. Blair; Eric C. Carpenter; Edward H. Coe; David M. Dooley; Bert H. Gibbs; Gibbs Family: Tillie H. Gibbs, H. Jarrell Gibbs; and Diane (Gibbs) Nichols; C.J. Hardeman Family; Elizabeth C. Morris; William D. Owens, Jr.; Daniel J. Schneider Family; Roger Thompson; Kay Thompson; Lois Thompson; Robert Tracy; Donald A. Wood; and G.A.S.P. ("C.O.N.T.R.O.L."). The court has considered both motions

and determined that they should both be denied. It is accordingly

ORDERED, ADJUDGED, and DECREED that both the Motion for New Trial and the Motion for Sanctions filed by C.O.N.T.R.O.L. are DENIED.

SIGNED this 13th day of March, 1995."

/s/ F. Scott McCown
JUDGE PRESIDING

(Denial was in reference to Petitioner's Motion for New Trial raising the federal preemption issue:

...

"V.

The court erred in dismissing Movants' (Plaintiffs/Intervenors') appeal in that the issues raised in their original petition in Cause No. 94-06964 were appropriate for disposition ... . Judicial economy will be served by the court's consideration of and disposing of all matters raised in Plaintiffs' original petition in Cause 94-06964, Paragraph VII, ... and the matter raised for declaratory judgment, the FAA Order 5200.5A on page 17 of said petition.

VI.

... Movants urge the court to grant a new trial because of wrongful dismissal on the basis set forth above of the matters raised in:

...

(b) Arabic numeral (2) based upon the

Commission's decision to rely upon the testimony of Sentry's bird expert rather than on the credible testimony in the record from the federal government's top-ranking FAA wildlife expert, Mr. Gene LeBoeuf;

...

o) (Second) Roman Numeral VII on page 17 of the petition, regarding the Commission's failure to take into consideration Declaratory judgment issues pertaining to FAA Order 5200.5A's application to the pertinent facts in this case; ...")

6. **Judgment of the Texas Court of Appeals: February 14, 1996**

IN THE COURT OF APPEALS
THIRD DISTRICT OF TEXAS
AT AUSTIN

JUDGMENT RENDERED FEBRUARY 14, 1996

NO. 03-95-00244-CV

C.O.N.T.R.O.L.; CITY OF ARGYLE; TOWN OF BARTONVILLE; TOWN OF COPPER CANYON; CITY OF HASLET; CITY OF JUSTIN; TOWN OF NORTHLAKE; CITY OF ROANOKE; ARGYLE INDEPENDENT SCHOOL DISTRICT; NORTHWEST INDEPENDENT SCHOOL DISTRICT; ARGYLE VOLUNTEER FIRE DEPARTMENT; JUSTIN

VOLUNTEER FIRE DEPARTMENT; DENTON COUNTY ELECTRIC CO-OP; GRAHAM-ARGYLE CEMETERY ASSOCIATION; PRAIRIE MOUND CEMETERY ASSOCIATION; JUSTIN STATE BANK; NORTHWEST REGIONAL AIRPORT; LIL ARNOLD; REBECCA R. BLAIR; ERIC C. CARPENTER; EDWARD H. COE; DAVID M. DOOLEY; BERT H. GIBBS; GIBBS FAMILY: TILLIE H. GIBBS, H. JARRELL GIBBS, AND DIANE (GIBBS) NICHOLS; C.J. HARDEMAN FAMILY; ELIZABETH C. MORRIS; WILLIAM D. OWENS, JR.; DANIEL J. SCHNEIDER FAMILY; ROGER THOMPSON; KAY THOMPSON; LOIS THOMPSON; ROBERT TRACY; DONALD A. WOOD; AND G.A.S.P. V. SENTRY ENVIRONMENTAL, L.P. AND TEXAS NATURAL RESOURCE CONSERVATION COMMISSION
APPEAL FROM 201ST DISTRICT COURT OF TRAVIS COUNTY BEFORE CHIEF JUSTICE CARROLL, JUSTICES JONES AND B.A. SMITH
AFFIRMED--OPINION BY CHIEF JUSTICE CARROLL

THIS CAUSE came on to be heard on the transcript of the record of the court below, and the same being considered, because it is the opinion of this Court that there was no error in the trial court's judgment: IT IS THEREFORE considered, adjudged and ordered that the judgment of the trial court is in all things affirmed. It is FURTHER ordered that the appellants C.O.N.T.R.O L.; City of Argyle; Town of Bartonville; Town of Copper Canyon; City of Haslet; City of Justin; Town of Northlake; City of Roanoke; Argyle Independent School District; Northwest Independent School District; Argyle Volunteer Fire Department; Justin Volunteer Fire Department; Denton County Electric Co-op; Graham-Argyle Cemetery Association; Prairie Mound Cemetery Association; Justin State Bank; Northwest Regional Airport;

Lil Arnold; Rebecca R. Blair; Eric C. Carpenter; Edward H. Coe; David M. Dooley; Bert H. Gibbs; Gibbs Family: Tillie H. Gibbs, H. Jarrell Gibbs, and Diane (Gibbs) Nichols; C.J. Hardeman Family; Elizabeth C. Morris; William D. Owens, Jr.; Daniel J. Schneider Family; Roger Thompson; Kay Thompson; Lois Thompson; Robert Tracy; Donald A. Wood; and G.A.S.P., pay all costs relating to this appeal, both in this Court and the court below; and that the cash deposit made in the trial court in lieu of an appeal bond be subject to and used for the payment of such costs; and that this decision be certified below for observance.

TEXAS COURT OF APPEALS
THIRD DISTRICT
AT AUSTIN

NO. 03-95-00244-CV

C.O.N.T.R.O.L.; City of Argyle, Town of Bartonville; Town of Copper Canyon; City of Haslet; City of Justin; Town of Northlake; City of Roanoke; Argyle Independent School District; Northwest Independent School District; Argyle Volunteer Fire Department; Justin Volunteer Fire Department; Denton County Electric Co-Op; Graham-Argyle Cemetery Association; Prairie Mound Cemetery Association; Justin State Bank; Northwest Regional Airport; Lil Arnold; Rebecca R. Blair; Eric C. Carpenter; Edward H. Coe; David M. Dooley; Bert H. Gibbs; Gibbs Family: Tillie H. Gibbs, H. Jarrell Gibbs, and Diane (Gibbs) Nichols; C.J. Hardeman Family; Elizabeth C. Morris; William D. Owens, Jr.; Daniel J. Schneider Family; Roger Thompson; Kay Thompson; Lois Thompson; Robert Tracy; Donald A. Wood; and G.A.S.P., Appellants

v.

Sentry Environmental, L.P. and Texas Natural Resource Conservation Commission, Appellees

From the District Court of Travis County
201st Judicial District
No. 94-07067
Honorable F. Scott McCown, Judge Presiding

This appeal arises out of the denial of a landfill permit to appellee Sentry Environmental, L.P. ("Sentry") on March 31, 1994, by the Texas Natural Resource Conservation Commission (the "Commission"). Although successful before the Commission, appellants[1] now protest the grounds relied on by the Commission to deny the landfill permit. Upon judicial review of the Commission's decision,

---

[1]The following parties are appellants in this action: C.O.N.T.R.O.L.; City of Argyle; Town of Bartonville; Town of Copper Canyon; City of Haslet; City of Justin; Town of Northlake; City of Roanoke; Argyle Independent School District; Northwest Independent School District; Argyle Volunteer Fire Department; Justin Volunteer Fire Department; Denton County Electric Co-op; Graham-Argyle Cemetery Association; Prairie Mound Cemetery Association; Justin State Bank; Northwest Regional Airport; Lil Arnold; Rebecca R. Blair; Eric C. Carpenter; Edward H. Coe; David M. Dooley; Bert H. Gibbs; Gibbs Family: Tillie H. Gibbs, H. Jarrell Gibbs, and Diane (Gibbs) Nichols; C.J. Hardeman Family; Elizabeth C. Morris; William D. Owens, Jr.; Daniel J. Schneider Family; Roger Thompson; Kay Thompson; Lois Thompson; Robert Tracy; Donald A. Wood; and G.A.S.P.

the district court dismissed the case for lack of jurisdiction. Appellants challenge this decision in eight points of error. We will affirm the trial-court judgment.

## BACKGROUND

In 1990, Sentry filed an application for a municipal solid waste permit. During the course of the hearings, the Commission considered several alternative grounds for rejecting the landfill application. Among these were the impact of the proposed landfill on surrounding land values and the increased risk to air traffic resulting from birds that, in traveling between a nearby lake and the proposed landfill, would be forced to fly directly over the flight space of Northwest Regional Airport.

The Commission entered a final order denying Sentry's application based on the grounds that Sentry had not adequately characterized deep groundwater at the site and that Sentry had failed to establish that the operation of the landfill as proposed would not contaminate groundwater located beyond the boundaries of the site. In its final order, the Commission expressly rejected all other grounds for denying the permit.

Following the decision by the Commission, both Sentry and appellants filed petitions for judicial review. Appellants sought affirmance of the Commission's order but asked that the Commission's determinations regarding certain alternative issues be reversed and that the basis for denial of the permit be expanded to include the impact on surrounding land values and the increased risk to air traffic. Further, appellants wanted the district court to review Sentry's use of contingency fee witnesses and Sentry's

multiple permit application amendments which increased attorneys' fees. Appellants seek this additional remedy primarily to make it more difficult for Sentry to reapply for a landfill site in the future. Sentry filed a separate petition requesting judicial review of the denial by the Commission. The district court consolidated the two actions and then dismissed appellants' petition for want of jurisdiction. Then, on January 3, 1995, the district court granted Sentry's motion for non-suit of its claims.

## DISCUSSION

In their first point of error, appellants argue that the district court erred in dismissing appellants' claim for want of jurisdiction. We disagree.

Although the order dismissing the claim for want of jurisdiction does not specify the grounds by which the trial court reached its determination, the ability of a party to obtain judicial review of an administrative decision is determined by section 2001.171 of the Administrative Procedure Act ("APA"). *See* Tex. Gov't Code Ann. §2001.171 (West 1996). This section provides "[a] person who has exhausted all administrative remedies available within a state agency *and who is aggrieved* by a *final decision* in a contested case is entitled to judicial review under this chapter." *Id.* (emphasis added). Appellants are not parties who have been aggrieved by a final decision by the Commission. As such, the district court lacked jurisdiction to entertain the appeal and properly dismissed the claim.

Appellants contend that they did not receive all of the relief they sought when the Commission denied the landfill

permit to Sentry. According to appellants, they became aggrieved parties when the Commission, in denying the permit for the proposed landfill, expressly rejected the grounds advanced by appellants and chose to deny the permit based solely on the groundwater contamination issue.

In general, a party appeals from a judgment and not from a finding or conclusion in support of the judgment. *Champlin Exploration Inc. v. Railroad Comm'n,* 627 S.W.2d 250, 251 (Tex. App.--Austin 1982, writ ref'd n.r.e.). In *Champlin*, we held that Champlin Exploration failed to demonstrate it was an aggrieved party when it prevailed in receiving the requested relief, but the Commission ruled against it on a supporting issue. *Id.* As in *Champlin*, the Commission expressly rejected certain of appellants' supporting issues concerning land values and FAA preemption, but appellants in this case were ultimately successful in getting the Commission to deny Sentry's application for a solid waste permit. We must judge the agency order on the basis upon which it purports to rest and not upon what we might imagine is an adequate or more proper basis. *Professional Mobile Home Transp. v. Railroad Comm'n,* 733 S.W.2d 892, 904 (Tex. App.--Austin 1987, writ ref'd n.r.e.).

More recently in *Gulf States Utilities v. Coalition of Cities*, 883 S.W.2d 739 (Tex. App.--Austin 1994, no writ), we determined that Gulf States was not aggrieved as that term is used in APA section 2001.171. *Id.* at 746-47. In *Gulf States*, the Public Utility Commission determined that Gulf States had not carried its burden of proof in demonstrating that $1.453 billion should be included as part of their prudent investment calculation. However, the Commission agreed to reconsider the prudence of the

expenditure in a subsequent proceeding. Because the Commission determined to reconsider the expenditure at a later date, Gulf States was removed from the definition of an "aggrieved party." *Id.*

Appellants further contend that their position is supported by the language in APA section 2001.174. Section 2001.174 provides in pertinent part that:

> If the law authorizes review of a decision in a contested case under the substantial evidence rule or if the law does not define the scope of judicial review, a court may not substitute its judgment for the judgment of the state agency on the weight of the evidence on questions committed to agency discretion but:
>
> (1) may affirm the agency decision in whole or in part; and
>
> (2) shall reverse or remand the case for further proceedings if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (A) in violation of a constitutional or statutory provision;
>
> (B) in excess of the agency's statutory authority;
>
> (C) made through unlawful procedure;
>
> (D) affected by other error

of law;

(E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or

(F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Tex. Gov't Code Ann. §2001.174 (West 1996). Specifically, a court can reverse or remand only if "substantial rights of the appellant have been prejudiced." In this case, appellants' substantial rights do not include the right to mold an agency determination such that it will better thwart future permit applications by Sentry. No harm can be done to a substantial right that never existed. *Gulf States*, 883 S.W.2d at 751.

Appellants unsuccessfully attempt to qualify as aggrieved parties under the APA. Accordingly, we overrule appellants' first point of error.

## CONCLUSION

Because the trial court properly determined it lacked jurisdiction, we affirm the decision of the trial court dismissing appellants' claims. We do not, therefore, address points of error two through eight. *See* Tex. R. App. P. 90(a).

Jimmy Carroll, Chief Justice

Before Chief Justice Carroll, Justices Jones and B.A. Smith

Affirmed

Filed: February 14, 1996

Publish

(Affirmance denied relief on federal preemption issues raised in Petitioners' Brief of June 29, 1995:

...

"POINT OF ERROR TWO

The district court erred by dismissing Appellants claim that FAA regulations, statutes, orders and findings preempt TNRCC regulations and findings and prohibit the proposed landfill.

POINT OF ERROR THREE

The district court erred by dismissing Appellants' claim that Health & Safety Code §361.069 is preempted by federal statutes and FAA regulations, orders and findings.

POINT OF ERROR FOUR

The district court erred by dismissing Appellants' claim that TNRCC erred in finding FAA Order 5200.5A was not fully supported in the record. ...")

7. **Official Notice of the Texas Court of Appeals: March 20, 1996**

DATE: March 20, 1996
RE: Case No. 03-95-00244-CV

STYLE: C.O.N.T.R.O.L.; City of Argyle; Town of Bartonville; Town of Copp [*sic*]
v. Sentry Environmental, L.P. and Texas Natural Resource Conservati [*sic*]

The appellants' motion for rehearing was overruled by this Court on the date noted above.

T.C. Case #94-07067 Diane O'Neal, Clerk

(Overruling by Court included Petitioners' federal preemption issue raised in Petitioners' March 1, 1996 Motion for Rehearing:

"...

STATEMENT OF POINTS OF ERROR
POINT OF ERROR ONE

The Court of Appeals erred in overruling point of error one ... .

Additionally, Appellants sought relief under the Uniform Declaratory Judgment Act, V.T.C.A., Civil Practice and Remedies Code, §37.001, *et seq.* ... Appellants are affected by TNRCC agency orders and the application of Health & Safety Code §361.069. They fairly raised by pleading FAA Order 5200.5A and related FAA statutes, rules, and regulations. ...

8. **Order Denying Writ of Error Application by Texas Supreme Court: August 1, 1996**

August 1, 1996

Mr. Roger D. Sanders
Sanders Mumm O'Hanlon
& Motley
111 South Travis Street
Sherman, TX 75090

Mr. Roliff H. Purrington, Jr.
Mayor Day Caldwell & Keeton
700 Louisiana
Suite 1900
Houston, TX 77002-2778

Mr. Michael John Wynne
Mayor Day Caldwell
& Keeton
700 Louisiana Suite 1900
Houston, Tx 77002

The Honorable Dan Morales
Attorney General of Texas
P.O. Box 12548 Capital Station
Austin, TX 78711-2548

Ms. Cynthia Woelk
Office of the Attorney General of Texas
Dan Morales, A.G.
P.O. Box 12548, Capitol Station
Austin, TX 78711

RE: Case Number 96-0449
Style: C.O.N.T.R.O.L., et al.
v.
SENTRY ENVIRONMENTAL, L.P. and TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation

'Writ Denied'.

Sincerely

John T. Adams, Clerk
by /s/ Michael Kopp
Michael Kopp, Deputy

(Denial of writ was in reference to Petitioners' federal preemption issues in their Application for Writ of Error of April 19, 1996:

"STATEMENT OF POINTS OF ERROR

...

POINT OF ERROR TWO

The district court erred by dismissing, and the court of appeals erred by failing to address, Petitioners' claim that the TNRCC disregarded FAA regulations, statutes, orders and findings which preempt TNRCC regulations and findings and prohibit the proposed landfill.

POINT OF ERROR THREE

The district court erred by dismissing, and the court of appeals erred by failing to address, Petitioners' claim that Health & Safety Code §361.069 is preempted by federal statutes and FAA regulations, orders and findings.

POINT OF ERROR FOUR

The district court erred by dismissing, and the court of appeals erred by failing to address, Petitioners' claim that TNRCC erred in finding FAA Order 5200.5A was not fully supported in the record.")

9. **Order Overruling Motion for Rehearing by Texas Supreme Court: September 12, 1996**

September 12, 1996

Mr. Roger D. Sanders
Sanders Mumm O'Hanlon
& Motley
111 South Travis Street
Sherman, TX 75090

Mr. Roliff H. Purrington, Jr.
Mayor Day Caldwell & Keeton
700 Louisiana
Suite 1900
Houston, TX 77002-2778

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Ms. Cynthia Woelk
Office of the Attorney General of Texas
Dan Morales, A.G.
P.O. Box 12548, Capitol Station
Austin, TX 78711

RE: Case Number 96-0449
Style: C.O.N.T.R.O.L., et al.
v.
SENTRY ENVIRONMENTAL, L.P. and TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ

of error in the above styled case.

Sincerely

John T. Adams, Clerk
by /s/ Michael Kopp
Michael Kopp, Deputy

(The overruling was in reference to Petitioners' federal preemption issues in their Motion for Rehearing of August 16, 1996:

'STATEMENT OF POINTS OF ERROR ON MOTION FOR REHEARING

...

POINT OF ERROR TWO

"The Supreme Court erred in denying the application because the district court erred by dismissing, and the court of appeals erred by failing to address, Petitioners' claim that the TNRCC disregarded FAA regulations, statutes, orders and findings which preempt TNRCC regulations and findings and prohibit the proposed landfill.

POINT OF ERROR THREE

The Supreme Court erred in denying the application because the district court erred by dismissing, and the court of appeals erred by failing to address, Petitioners' claim that Health & Safety Code §361.069 is preempted by federal statutes and FAA regulations, orders and findings.")

MAY 6 1997

No. 96-1499
In the
SUPREME COURT OF THE UNITED STATES
October Term, 1996

---

C.O.N.T.R.O.L.; Cities of Argyle, Haslet, Justin, and Roanoke; Towns of Bartonville, Copper Canyon, and Northlake; Argyle and Northwest Independent School Districts; Argyle and Justin Volunteer Fire Departments; Denton County Electric Co-op; Graham-Argyle and Prairie Mound Cemetery Associations; Justin State Bank; Northwest Regional Airport; Lil Arnold; Rebecca R. Blair; Eric C. Carpenter; Edward H. Coe; David M. Dooley; Bert H. Gibbs; Gibbs Family: Tillie H. Gibbs, H. Jarrell Gibbs and Diane (Gibbs) Nichols; C. J. Hardeman Family; Elizabeth C. Morris; William D. Owens, Jr.; Daniel J. Schneider Family; Roger Thompson; Kay Thompson; Lois Thompson; Robert Tracy; Donald A. Wood; G.A.S.P.; and Carter-Walsh Thoroughbred Farm,
*Petitioners,*

vs.

Kathy Nielsen, Sentry Environmental, L.P., & Texas Natural Resource Conservation Commission,
*Respondents.*

.....

*On Petition for a Writ of Certiorari from the Supreme Court of the State of Texas*

---

# KATHY NIELSEN'S RESPONSE IN SUPPORT

---

Kathy Nielsen,
Respondent
1029 Joyce St.
Roanoke, TX 76262
T & F: (817) 430-1342

## QUESTIONS PRESENTED

Adopted herein as though re-written in full as presented in the Petition for Writ of Certiorari.

## CITATIONS OF THIS CASE

Adopted herein as though re-written in full as presented in the Petition for Writ of Certiorari.

## BASIS FOR JURISDICTION

Adopted herein as though re-written in full as presented in the Petition for Writ of Certiorari.

## CONSTITUTIONAL AND OTHER PROVISIONS

Adopted herein as though re-written in full as presented in the Petition for Writ of Certiorari AND in addition:

United States Constitution, Preamble:

> "We, the people of the United States, in Order to....promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

United States Constitution, Article XIV, Section 1:

> "...No State shall make or enforce any law which shall abridge the privileges ...of citizens of the United States..."

## STATEMENT OF THE CASE

Adopted herein as though re-written in full as presented in the Petition for Writ of Certiorari.

## ARGUMENT

Adopted herein as though re-written in full as presented in the Petition for Writ of Certiorari; AND, as follows:

An expert from the FAA testified before the TNRCC, supporting the FAA regulations which do not need supporting as law is clearly law. This FAA testimony was erroneously dismissed as NOT relevant by TNRCC. FAA Order 5200.5A is not a 'new' regulation. FAA Order 5200.5A is written in simple, clear English. FAA Order 5200.5A is clearly applicable in this situation as the airport is well within the 5 mile radius specified in the law. FAA Order 5200.5A was erroneously dismissed as in-applicable by the TNRCC.

Clearly the TNRCC believes itself to be sacrosanct and that it does not need to conform to the Orders and regulations of our National agencies.

In addition to being without legal precedent nor justification, this wanton dismissal of FAA testimony and FAA Orders by the TNRCC places Kathy Nielsen's personal well being in jeopardy as Kathy Nielsen lives in the housing community which surrounds and is within 1 mile of the airport in question. Any substantially increased likelihood of bird strikes at this airport means a substantially increased likelihood that a plane will crash on either her person or her property, very likely injuring both severely.

Kathy Nielsen argues that her very safety and well-being are protected under the Constitution of the United States, and TNRCC's violation of the FAA Orders, specifically FAA Order 5200.5A, will violate these Constitutional Protections. The increased potential hazard caused by permitting landfills to be within 5 miles of an airport is a legally recognized jeopardy as per the FAA Orders.

This housing community in which Kathy Nielsen lives is also directly under the path taken

by airplanes when using the Northwest approach or ascent pattern en route to the Dallas-Fort Worth International Airport. Large jets very often fly very low along this corridor. The TNRCC's dismissal of the wisdom behind and legality of the FAA Orders also directly subjects hundreds of unwitting passengers on major airlines flying to and from the Dallas-Fort Worth International Airport to a substantially increased risk of danger, again due to the increased risk of bird strikes.

TNRCC's purposeful intent to disregard the FAA Orders and wisdom indicates that the TNRCC finds it perfectly acceptable that they place citizens, including Kathy Nielsen, and pilots into situations of grave peril and this is all done unnecessarily. TNRCC has no *need* to place all these people into peril as Texas still has many other sites where a landfill could be placed without jeopardizing the health, safety and well-being of others.

The precedent set, if the Supreme Court of the United States permits the TNRCC to ignore FAA Order 5200.5A, will allow any state agency or any citizen to legally, yet, arbitrarily, ignore any specific Federal regulation, according to the arguments of its of his own personal desires.

## CONCLUSION

The Petitioners Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Kathy Nielsen

Kathy Nielsen
1029 Joyce St.
Roanoke, TX 76262
T & F:817 430-1342

## APPENDIX

Herein adopted as though re-written in full as presented the Petition for Writ of Certiorari.

Supreme Court, U.S.
FILED
MAY 6 1997
OFFICE OF THE CLERK

No. 96-1499

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**IN THE SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1996

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C.O.N.T.R.O.L., et al., *Petitioners*,

*v.*

Kathy Nielsen, Sentry Environmental, L.P., and Texas Natural Resource Conservation Commission, *Respondents*.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS*

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# RESPONDENT'S BRIEF IN OPPOSITION

---

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Attorney General of Texas

JORGE VEGA
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*Counsel of Record

## QUESTIONS PRESENTED

1. Did a Texas court decide any federal issue in connection with this case?

2. Does the state court decision from which Petitioners seek a writ of certiorari rest entirely on a state law ground?

3. Does the FAA order cited by Petitioners have any preemptive effect over state landfill siting decisions?

## LIST OF PARTIES

Petitioners:

C.O.N.T.R.O.L.
City of Argyle
Town of Bartonville
Town of Copper Canyon
City of Haslet
City of Justin
Town of Northlake
City of Roanoke
Argyle Independent School District
Northwest Independent School District
Argyle Volunteer Fire Department
Denton County Electric Coop.
Graham-Argyle Cemetery Association
Prairie Mound Cemetery Association
Justin State Bank
Northwest Regional Airport
Lil Arnold
Rebecca R. Blair
Eric C. Carpenter
Edward H. Coe
David M. Dooley
Bert H. Gibbs
Gibbs Family: Tille H. Gibbs, H. Jarrell Gibbs; and Diane (Gibbs) Nichols
C.J. Hareman Family
Elizabeth C. Morris
Willaim D. Owens, Jr.
Daniel J. Schneider Family
Roger Thompson
Kay Thompson
Lois Thompson
Robert Tracy
Donald A. Wood

Petitioners (cont.):

G.A.S.P.
Carter-Walsh Thoroughbred Farm

Respondents:

Kathy Nielsen
Sentry Environmental, L.P.
Texas Natural Resource Conservation Commission

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II. The state court's decision rests solely on a state law ground -- *i.e.*, lack of standing under the judicial review provisions of the Texas Administrative Procedure Act. ..... 7

III. The FAA order at issue is meant exclusively as internal agency guidance and has no preemptive effect whatsoever. ..... 8

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No. 96-1499

---

**IN THE SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1996

---

C.O.N.T.R.O.L., *et al.*, *Petitioners*,

*v.*

Kathy Nielsen, Sentry Environmental, L.P., and Texas Natural Resource Conservation Commission, *Respondents.*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS*

---

# RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Texas Natural Resource Conservation Commission ("TNRCC"), by and through its attorney, the Attorney General of Texas, respectfully requests that this Court deny the Petition for Writ of Certiorari ("Petition") filed by C.O.N.T.R.O.L., *et al.* (collectively, "CONTROL"), seeking review of a state-court opinion entitled *C.O.N.T.R.O.L. v. Sentry Environmental, L.P.*, and reported at 916 S.W.2d 677 (Tex. Ct. App. 1996).[1]

---

[1] CONTROL has included an appendix to its Petition. Citations in this Brief in Opposition to items from the appellate record which are reprinted in that appendix will be to "CONTROL App. at __." Citations to the state court decision from which CONTROL seeks a writ of certiorari will be to the reported version (in S.W.2d) as well as to the reprinted text in CONTROL's appendix.

## JURISDICTION

In its jurisdictional statement, CONTROL mischaracterizes the procedural background of this case when it asserts that "[t]he Texas Supreme Court, lower courts and the Texas Natural Resource Conservation Commission . . . have decided an important federal preemption question in a manner that conflicts with decisions of the Courts of Appeal and the United States Supreme Court . . . ." (Petition at 2.) As explained below, although TNRCC issued a finding concerning the legal effect of a letter written by a Federal Aviation Administration ("FAA") official, no Texas court has decided the questions that CONTROL now attempts to raise.[2] Instead, and as explained below, the state court judgment from which CONTROL seeks review is based solely on state law. This Court, therefore, has no jurisdiction over that judgment.[3]

---

[2] In its jurisdictional statement, CONTROL refers to an order of TNRCC dated March 4, 1994. (Petition at 2.) CONTROL refers again to this "orally pronounced order" in its statement of the case. (*Id.* at 7.) In its Appendix, CONTROL sets forth a "transcribed . . . excerpt" which supposedly constitutes this purported "Oral Finding and Order." *See* CONTROL App. at ii. It should be noted that this item, as set forth in CONTROL's Appendix, does not appear on its face to be an order. More importantly, this item is not part of the appellate record.

[3] Furthermore, CONTROL's assertion that purported decisions of the Texas courts and TNRCC conflict with the decision of this Court in *Hines v. Davidowitz*, 312 U.S. 52 (1940) (*see* Petition at 2), is incorrect. *Hines v. Davidowitz* is a supremacy clause case in which the Court ruled that Pennsylvania's immigration law could not be enforced because Congress had passed a "a single integrated and all-embracing" system for the regulation of aliens, immigration, and naturalization. 312 U.S. at 74. Contrary to the suggestion raised by CONTROL, *Hines v. Davidowitz* does not address the preemptive effect of an internal FAA order.

## STATEMENT OF THE CASE

Rule 14(g)(i) of the rules of this Court requires a petitioner to specify, in its statement of the case, "the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts." Rule 14(g)(i) also requires "specific reference to the places in the record where the matter appears . . . ." CONTROL fails to comply with this rule.

CONTROL simply lists a group of pleadings and briefs and asserts that petitioners "preserved their position" in those items. (Petition at 7.) CONTROL fails to specify the method and manner in which it raised the federal questions and fails to provide specific reference to the places in the record where those questions were supposedly raised.[4] Further, CONTROL asserts that "[a]t each stage, [its] raising of the federal preemption issue was dismissed or overruled." (Petition at 8.) Again, CONTROL fails to comply with Rule 14(g)(i) in that there are no specific references to places in the record where these issues were passed on by the courts.

CONTROL fails to provide such references because, as further explained below (*infra* at 5-7), no state court ruled on the questions it now attempts to present to this Court. Indeed, no state court below ruled on any federal preemption issue, or on any other issue of federal law.

The following is a concise statement which presents an accurate picture of the facts material to the questions presented:

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[4] Some of the pleadings cited by CONTROL on pages 7-8 of its Petition as having "preserved their position" do not adequately raise the issues that CONTROL now tries to bring before this Court. *See, e.g.*, R. 3 (Plaintiff's Original Petition), R. 56 (Protestant's Motion to Reopen Hearing), 1st Supplemental Record at 2 (Motion for New Trial).

This case began as an appeal, in state district court,[5] of an order of TNRCC, a state administrative agency with jurisdiction over many environmental matters, denying a solid waste landfill permit to Sentry Environmental, L.P. ("Sentry"). CONTROL had opposed the issuance of the permit at the proceeding before TNRCC. Though successful at the agency -- *i.e.*, the permit application was denied -- CONTROL nevertheless sought to appeal TNRCC's decision in state district court, in an attempt to reverse certain TNRCC findings, and to have TNRCC's denial of the permit expanded to include denial on additional grounds. 916 S.W.2d at 678 (CONTROL App. at xlv - xlvi); (R. 12[6] (Plaintiffs' Original Petition)).[7]

TNRCC argued to the district court that CONTROL lacked standing to appeal an agency order under the Texas APA because CONTROL was not "aggrieved by the agency's order." (R. 408-9 (Defendant's Plea in Abatement, Pleas to the Jurisdiction and Defendant's Original Answer).) The district court granted TNRCC's plea and dismissed CONTROL's claims for want of jurisdiction. (R. 439-40 (Order Dismissing Plaintiff's and Plaintiff Intervenor's Claims for Want of Jurisdiction)); CONTROL App. at xxxvi - xxxvii.[8]

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[5] This case was filed as an administrative appeal of a state agency decision pursuant to the judicial review provisions of the Texas Administrative Procedure Act ("APA"), TEX. GOV'T CODE ANN. §§ 2001.171-.178 (West Pamph. 1997).

[6] The appellate record in this case presently resides with the Clerk of the state Court of Appeals, Third District at Austin. Citations to that record will be indicated by "R." followed by the Bates-stamped page number.

[7] CONTROL recognizes, in its Petition, that it was "successful in defeating the landfill permit" and indicates that its present concern is that of a "renewed landfill application by Sentry . . . ." (Petition at 10.)

[8] In reprinting items from the record in its Appendix, CONTROL includes more than the words of the actual items as they appear in the record. For example, following the text of the state district court's order on pages xxxvi and xxxvii of

CONTROL appealed the district court's judgment to the state court of appeals. The appeals court affirmed on the ground that CONTROL lacked standing to challenge the TNRCC's decision since it was not aggrieved. 916 S.W.2d at 679 (CONTROL App. at xlvi). The court further explained that CONTROL's "rights do not include the right to mold an agency determination such that it will thwart future permit applications by Sentry." *Id.* at 679-80 (CONTROL App. at xlix). Although CONTROL had asserted seven additional points of error, the appeals court never addressed them, deciding only that the district court properly dismissed CONTROL's claims for lack of jurisdiction. *Id.*

Following the court of appeal's affirmance of the district court's dismissal, CONTROL applied to the Supreme Court of Texas for a discretionary writ of error. The Supreme Court of Texas summarily denied that application without an opinion. CONTROL App. at lii - liii. CONTROL now seeks review in this Court.

## REASONS WHY THE PETITION SHOULD BE DENIED

### I. No Texas court decided any federal issue in connection with this case

As stated above, no Texas court has decided any of the federal preemption questions that CONTROL now seeks to present to this Court. An examination of the decision below (*see 916* S.W.2d 677 (CONTROL App. at xli - l)) reveals that the state appellate court decided neither of the questions posed by CONTROL, and, in fact, decided no issue of federal law. Rather, the appellate court affirmed the district court's dismissal of

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CONTROL's Appendix, counsel for CONTROL adds, in parenthesis, editorial comment and argument. (*See* Appendix to Petition at ii, xxxv, xxxvii, xxxviii, xl, xli, l, li, liii, lv.) Only through a careful comparison of CONTROL's Appendix with the actual record can a reader determine what is the verbatim text of the items as they appear in the record, and what is commentary and argument.

CONTROL's claims, deciding solely on state law grounds (*i.e.*, lack of standing under the Texas APA).

The only place where any decision-making body in Texas came anywhere near addressing the questions that CONTROL now attempts to present to this Court is in the TNRCC order that CONTROL initially sought to appeal. That order contained a finding concerning the legal effect of a letter written by an FAA official regarding the proximity of the proposed landfill to an airport. That finding stated as follows:

> The [FAA]'s . . . Order No. 5200.5A provides guidance concerning the location of municipal solid waste landfills within the vicinity of airports. *An FAA letter issued pursuant to this order does not preempt the Commission's authority and duty to determine whether a proposed landfill is compatible with adjacent land uses.* As the FAA order states itself, the FAA neither approves nor disapproves locations of landfill facilities.

(R. 52-3); CONTROL App. at ii, xxxi - xxxii (Order of TNRCC Denying the Application of Sentry Environmental to Operate a Municipal Solid Waste Landfill in Denton County).

As noted above, TNRCC argued to the district court that CONTROL lacked standing under the Texas APA, and the district court dismissed CONTROL's claims for want of jurisdiction. *See supra* at 4. The state appeals court affirmed the district court's judgment on the ground that CONTROL lacked standing to challenge the TNRCC's decision since it was not an aggrieved party. *See* 916 S.W.2d at 679 (CONTROL App. at xlvi). CONTROL's application for a discretionary writ of error to the Supreme Court of Texas was summarily denied without an opinion. *See* CONTROL App. at lii - liii.

Thus, neither the district court, the court of appeals, nor the Supreme Court of Texas ever addressed any issue related to FAA

Order 5200.5A or a letter written pursuant to its guidance including any purported preemptive effect of that order or such a letter, the constitutionality of TEX. HEALTH & SAFETY CODE ANN. § 361.069, or any other supremacy clause or federal law issue.

Since the preemption issues that CONTROL now attempts to raise were not decided by any Texas court, this Court should not visit these questions. *See, e.g., Adams v. Robertson*, ___ U.S. ___, ___, 117 S. Ct. 1028, 1029 (1997)(stating rule that, except for "very rare exceptions," the Court will not consider a federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n. 3, 103 S. Ct. 2296, 2300 n. 3 (1983) (holding that the Court had no jurisdiction to consider a preemption issue where it did not affirmatively appear that the issue was decided in the state courts below); *Illinois v. Gates*, 462 U.S. 213, 218-19, 103 S. Ct. 2317, 2321-22 (1983) (discussing whether the requirement that a federal question be raised and decided in the state court below is jurisdictional or prudential and holding that, in any event, the court would not consider an issue when it was not raised below).

II. The state court's decision rests solely on a state law ground -- *i.e.*, lack of standing under the judicial review provisions of the Texas Administrative Procedure Act.

As noted above, the state appellate court decision from which CONTROL seeks review was decided solely on state law grounds (*i.e.*, lack of standing under the Texas APA). *See* 916 S.W.2d 677 (CONTROL App. at xli - l). The appellate court quoted TEX. GOV'T CODE ANN. § 2001.171,[9] which sets forth the basic right of appeal of state agency decisions in Texas, and held that since

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[9] That section states that "[a] person who has exhausted all administrative remedies available within a state agency *and who is aggrieved* by a final decision in a contested case is entitled to judicial review under this chapter. TEX. GOV'T CODE ANN. § 2001.171(emphasis added).

CONTROL and the other appellants were successful at the agency proceeding, they lacked standing to appeal because they "are not parties who have been aggrieved by a final decision of the [TNRCC]." 916 S.W.2d at 679 (CONTROL App. at xlvi). Because the appellate court overruled CONTROL's first point of error, holding that the trial court properly determined that it lacked jurisdiction, the court did not address any of the other points of error advanced by CONTROL. 916 S.W.2d at 680 (CONTROL App. at xlix).

This court has no jurisdiction to review decisions based on adequate, non-federal grounds. *E.g.*, *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S. Ct. 2546, 2553-54 (1991); *Republican National Committee v. Burton*, 455 U.S. 1301, 1302, 102 S. Ct 1240, 1241 (1982); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210, 56 S. Ct. 183, 184 (1935). "This rule applies whether the state law ground is substantive or procedural." *Coleman*, 501 U.S. at 729, 111 S. Ct. at 2554; *see also Osbourne v. Ohio*, 485 U.S. 103, 123, 110 S. Ct. 1691, 1703 (1990) (holding that when highest state court ruled, citing state law, that litigant waived right to assert due process challenge because counsel failed to pose an objection at trial, the failure to comply with this procedural rule constituted an adequate state law ground to support the result below and prevented the Supreme Court from reaching the due process contention).

Since the state court decision from which CONTROL seeks a writ of certiorari is based entirely on a state law ground, the Supreme Court of the United States has no jurisdiction over this case.

III. The FAA order at issue is meant exclusively as internal agency guidance and has no preemptive effect whatsoever.

Finally, even if the Court had jurisdiction to review the state court decision at issue and if the Court were inclined to visit the questions presented by CONTROL, it is readily apparent that the

FAA order cited by CONTROL has no preemptive effect over state solid waste landfill siting and permit decisions.

As noted above, TNRCC, in its order denying Sentry's permit, concluded that FAA Order No. 5200.5A "provides *guidance* concerning the location of municipal solid waste landfills within the vicinity of airports." CONTROL App. at xxxi (R. 52)(emphasis added). TNRCC further found that "[a]n FAA letter issued pursuant to this order does not preempt the Commission's authority and duty to determine whether a proposed landfill is compatible with adjacent land uses." *Id.*

This view of FAA Order 5200.5A, and any letter written by an FAA official pursuant to the guidance stated therein, comports completely with the view stated by the FAA itself. The FAA has stated, in a Federal Register notice, as follows:

> The current Order 5200.5A, "Waste Disposal Sites On or Near Airports" . . . contain[s] criteria concerning the establishment, elimination, or monitoring of landfills, open dumps, waste disposal sites, or other similar facilities on or in the vicinity of airports. Orders such as 5200.5A are internal agency directives that provide guidance to FAA employees . . . . *These orders . . . have no authority over facilities located off airport property.* Also, *FAA has no authority to approve or redirect land use outside of the airport perimeter.*

60 Fed. Reg. 27805, 27807 col. 1 (1995)(emphasis added). Therefore, even if the questions presented by CONTROL were properly placed before this Court, the FAA order cited by CONTROL has no preemptive effect over the solid waste landfill siting decisions of a state.

## CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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